UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 310	
Charged Party; and	
KMU TRUCKING & EXCAVATING	Case No. 08-CD-109665
SCHIRMER CONSTRUCTION CO.	Case No. 08-CD-109666
PLATFORM CEMENT	Case No. 08-CD-109671
21ST CENTURY CONCRETE CONSTRUCTION, INC.	Case No. 08-CD-109683
INDEPENDENCE EXCAVATING, INC.	Case No. 08-CD-109709
DONLEY'S, INC.	Case No. 08-CD-114937
Charging Parties; and	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18	
Party-in-Interest.	

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18'S POST-HEARING BRIEF

Respectfully Submitted,

s/ *Timothy R. Fadel*
TIMOTHY R. FADEL, ESQ. (0077531)
WULIGER, FADEL & BEYER, LLC
1340 Sumner Court
Cleveland, Ohio 44115
(216) 781-7777
tfadel@wfblaw.com
Counsel for the International Union of Operating Engineers, Local 18

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POST-HEARING BRIEF

I. Introduction

This matter does not concern rival unions, each making a claim to an innocent employer for the assignment of work. Rather, the Laborers' International Union of North America, Local 310 ("LIUNA 310"), the Construction Employers Association ("CEA"), and the Charging Parties have colluded to manipulate the provisions of the National Labor Relations Act ("Act" or "NLRA"). The Charging Parties are attempting to use Sec. 10(k) proceedings as a tool to bypass the duly negotiated work preservation clause contained within the International Union of Operating Engineers, Local 18's ("Local 18" or "Union") collective bargaining agreement ("CBA") with the CEA ("CEA Agreement"), to which the Charging Parties are signatories. As such, there is no reasonable cause to believe that Sec. 8(b)(4)(D) of the Act has been violated. Indeed, Local 18 is only asserting its right to collect damages under the terms of its agreement which specifies a financial penalty in the event equipment within the Union's craft jurisdiction is assigned to someone other than an operating engineer. Local 18 has made no claim to the work identified in the Charging Parties' ULP charges and has traditionally performed the work at issue for the Charging Parties. Under these circumstances, pursuant to unquestionably established principles of administrative law, a union's enforcement of a work preservation clause is not within the aegis of the Board's jurisdiction, as the Charging Parties are not innocent employers caught between two competing demands for work. As such, there is no jurisdictional dispute, and the Charging Parties' allegations are not amenable to resolution under Sec. 10(k) of the Act.

II. Parties

a. International Union of Operating Engineers, Local 18 and the Construction Employers Association

For over seventy years, Local 18 has represented the interests of building construction equipment operators ("operating engineers" or "Local 18 members") working in the State of Ohio. Currently, Local 18 represents approximately 15,000 operating engineers working in 85 of Ohio's 88 counties along with four counties in Northern Kentucky. (*Donley's I*, TR 1043-1046, 1050; *Donley's I*, Jt. Exhs. 1-2.)[1] Headquartered in Cleveland, Ohio, Local 18 operates six district offices across the state. (*Donley's I*, TR 1043-1051.) For decades, Local 18 has negotiated a series of CBAs covering the building construction industry with the CEA, a multi-employer bargaining association that represents construction companies throughout Northeast Ohio. These companies include, but are not limited to, the Charging Parties in the instant matter, namely: KMU Trucking & Excavating ("KMU"), Schirmer Construction Co. ("Schirmer"), Platform Cement, Inc. ("Platform"), 21st Century Concrete Construction, Inc. ("21st Century"), Independence Excavating, Inc. ("Independence"), and Donley's, Inc. ("Donley's"). (TR 81-82, 130, 216-217, 229, 274, 335-336.) Accordingly, the Charging Parties have specifically assigned their collective bargaining rights to the CEA.

b. Laborers' International Union of North America, Local 310

In addition to negotiating building construction agreements with Local 18, the CEA also negotiates separate agreements with other labor organizations, including local affiliates of the Laborers' International Union of North America ("LIUNA"). For building construction work performed in and around Cleveland, Ohio, the CEA negotiates with LIUNA 310. (TR 394-395.)

[1]At the hearing, upon oral motion by the Charging Parties and LIUNA 310, the Hearing Officer officially incorporated the records of two previous Sec. 10(k) proceedings. (TR 22-23.) The first case was *Laborers' Local 894 (Donley's, Inc)*, lead Case No. 08-CD-081837 (hereinafter "*Donley's I*") and the second case was *Laborers' Local 310 (Construction Employers Association)*, lead Case No. 08-CD-091689 (hereinafter "*Donley's II*.")

Unlike Local 18's agreement with the CEA, the CBA negotiated by LIUNA 310 fails to include any specific provision requiring or imposing any economic sanction in the event work or equipment contractually stipulated as belonging to a LIUNA affiliate is transferred to a non-LIUNA employee. (Jt. Exh. 1.) Also unlike Local 18's successive CEA Agreements, none of the agreements negotiated between LIUNA 310 and the CEA, prior to the current one, specifically identified forklifts and skid steers as construction equipment within their craft jurisdiction. (TR 372.)

III. Local 18's CEA Agreement

Each successive CEA Agreement, including the current one, have specifically identified forklifts and skid steers as construction equipment that is exclusively within Local 18's craft jurisdiction. (Jt. Exh. 3.) Specifically, Paragraphs 1-3, 10-13, 20, and 49-51 of the current CEA Agreement set forth the geographic, industrial, and craft jurisdictional scope – including, but not limited to forklifts and skid steers – of operating engineers. (Jt. Exh. 3A.) The Charging Parties acknowledged this immutable fact through stipulation (TR 84) and uncontradicted testimony. (TR 143, 217, 254, 362-363.) In order to preserve and protect the work performed by its membership and avoid jurisdictional dispute with other unions, Local 18 has historically and consistently negotiated a work preservation clause in these successive CEA Agreements, including the current one. Specifically, Paragraph 21 of the CEA Agreement states that "[i]f the Employer assigns any piece of equipment to someone other than the Operating Engineer, the Employer's penalty shall be to pay the first qualified registered applicant the applicable wages and fringe benefits from the first day of the violation." (E.g., Jt. Exh. 3A.) In this manner, while Local 18's work preservation clause explicitly allows a signatory employer to assign work as it

sees fit, it also creates an economic disincentive for a signatory employer to disregard Local 18's contractually-mandated craft jurisdiction.

In processing work preservation grievances, Local 18 has adopted a procedure whereby the offending contractor is immediately provided a written statement regarding the nature of the alleged breach. This written statement, colloquially referred to as a "Miranda Card," specifically advises the contractor that Local 18 is not seeking any reassignment of work. (TR 463.) Rather, in accordance with Paragraph 21 of the CEA Agreement, the Miranda Card states:

> "I have observed a breach of our contract with your company. You have assigned someone other than an operating engineer on the [equipment within Local 18's exclusive craft jurisdiction]. Our contract provides that the penalty for the breach is to pay the first qualified registered applicant in the referral all applicable wages and fringe benefits from the first day of the breach. I am not requesting nor can you correct this breach by a reassignment of the work." (E.g., L18 Exh. 7.)

Paragraph 21 of the CEA Agreement therefore reflects not only the agreed-upon contractual agreement between Local 18 and the Charging Parties, but the standard area and industry practice as well.

CEA signatory contractors desirous of obtaining an employee to operate equipment covered by the CEA Agreement are required to utilize the Union's referral procedure. (Jt. Exh. 3A, Art. III.) Local 18's referral system operates on a first-in-first-out basis. Under these rules, employers desirous of obtaining the services of an operating engineer are required to call the Union's dispatcher at the district office covering the area where the work is to be performed. (*Donley's II*, TR 645-647.) When making this call, employers must indicate the type of equipment to be operated along with any special requirements or certifications. (Id.) The dispatcher will move to unemployed operating engineers classified in Local 18's referral decks until a suitable applicant is found. (Id.) Once found, the applicant is referred to work for the requesting employer. (Id.) Pursuant to this referral system, for decades and up until the present

day, Local 18 members have operated forklifts and skid steers with a voluminous number of employers in Northeast Ohio, by virtue of over 2,000 work orders for such equipment. (*Donley's II*, TR 648-652.) Local 18 has also received over 260 letters of assignment from the same employers for both full-time and intermittent operation of fork lifts and skid steers. (Jt. Exhs. 6-7.)

As with most industrial CBAs, the CEA Agreement also contains a mandatory grievance and arbitration procedure which covers *any* dispute that arises under the terms and conditions of the Agreement, including, but not limited to Paragraph 21. (Jt. Exh. 3A, ¶¶ 114-115.) Local 18 has long utilized the grievance and arbitration procedure to process and resolve prior work preservation grievances arising under Paragraph 21 of the CEA Agreement with CEA signatory contractors, including, but not limited to: a grievance at a jobsite in Cleveland, Ohio with Independence (*Donley's II*, TR 109-110, 639-640, L18 Exh. 1), a grievance at a jobsite in Cleveland, Ohio with a construction company called Marous Brothers (*Donley's II*, TR 113-117, 641-642, L18 Exh. 2), and a grievance at a jobsite in Cleveland, Ohio with a construction company called Mr. Excavator (*Donley's II*, TR 117-121, 642-643, L18 Exh. 3.)

Critically, the Charging Parties' express assignment of forklift and skid steer work to operating engineers has continued in practice for more than a decade up until the current day. (TR 530-531.) Charging Party Platform has utilized operating engineers on skid steers at a jobsite in Northeast Ohio as recently as 2013. (TR 204-209, 458; L18 Exh. 1) Charging Party KMU has utilized operating engineers on skid steers at jobsites throughout Northeast Ohio starting in 2000 for over a decade. (TR 245-246, 264-265.) Charging Party 21st Century has utilized operating engineers on skid steers at a jobsite in Southwest Ohio as recently as 2012 (TR 291.) Charging Party Independence has utilized operating engineers on skid steers at various

jobsites throughout Ohio for over a decade. (TR 336; *Donley's II*, TR 190.) And Charging Party Schirmer has utilized operating engineers on forklifts and skid steers, both full-time and intermittently, at various jobsites throughout Northeast Ohio. (TR 460-461.) Not only have both KMU and 21st Century assigned forklift and skid steer work to operating engineers in practice, but also have signed letters of assignment with Local 18. In June of 2010 and January of 2013, respectively, both KMU and 21st Century explicitly acknowledged that operation of forklifts and skid steers specifically falls within the craft jurisdiction of the Union and accordingly assigned the operation, maintenance, repair, assembly and disassembly of that equipment, as used in its projects on both a full-time and intermittent basis to Local 18 members. (TR 247, 303-304; L18 Exhs. 2-3.) In addition, other Northeast Ohio contractors also signatories to the CEA Agreements have historically assigned forklift and skid steer work to operating engineers: B&B Wrecking and Excavating, Inc. (*Donley's II*, TR 787-799); Cleveland Cement Contractors, Inc. (*Donley's II*, TR 813); and Precision Environmental Co. (*Donley's II*, TR 720, 814-823.)

IV. Statement of Facts

a. 21st Century's ULP Charge

21st Century is a commercial concrete subcontractor based in Cleveland, Ohio, and primarily operates throughout Ohio. (TR 273.) 21st Century is a signatory to the current CEA Agreement (TR 274), and accordingly enjoys the benefits of the bargain contained therein, including, but not limited to the obtainment of operating engineers via usage of the Union's referral system. 21st Century has not only utilized operating engineers as recently as 2012 on skid steers at a jobsite in Southwest Ohio (TR 291), but also signed a letter of assignment with Local 18 in January of 2013, which explicitly acknowledges that operation of forklifts and skid steers specifically fall within the craft jurisdiction of the Union. Under this letter of assignment,

21st Century accordingly assigned the operation, maintenance, repair, assembly and disassembly of that equipment, as used in its projects on both a full-time and intermittent basis, to Local 18 members. (TR 303-304; L18 Exh. 3.)

On February 5, 2013, Local 18 documented an instance at the Southwest General Hospital addition project ("Southwest General jobsite") in Middleburg Heights, Ohio wherein 21st Century elected to assign the operation of a forklift to a non-operating engineer. (TR 462-465.) In accordance with Step 1 of the CEA Agreement's grievance procedure, Local 18 orally brought a grievance to 21st Century's attention on February 5 and presented a Miranda Card to a 21st Century supervisor which explicitly disclaimed a request for reassignment and instead requested damages as mandated by the parties' agreement. (TR 462-465; L18 Exh. 5.) In accordance with Step 2 of the grievance procedure, Local 18 then faxed a written grievance alleging a breach of the CEA Agreement's work preservation clause (Jt. Exh. 3A, ¶ 21) to 21st Century on February 7, 2013. (TR 462-465; L18 Exh. 5.) That is, by electing to assign construction equipment that is properly within the contractually mandated craft jurisdiction of Local 18's membership to a non-operating engineer, 21st Century was in breach of the CEA Agreement's work preservation clause and was contractually required to pay damages to the first qualified registered applicant in the amount of all applicable wages and fringe benefits from the first day of the violation. (Id.)

On July 23, 2013, rather than adhere to its contractual mandate to process Local 18's grievance, 21st Century filed a ULP Charge, alleging that a jurisdictional dispute was taking place by and between LIUNA 310 and Local 18 regarding the operation of forklifts or skid steers. Notably, the Charge did not identify any particular jobsites, but rather "any and all projects," and contained no allegations against Local 18 claiming that it either engaged in

coercive conduct pursuant to Sec. 8(b)(4)(D) or otherwise made any claims to the work at the South Pointe jobsite.

b. KMU's ULP Charge

KMU is a demolition and site work company based in Avon, Ohio, and primarily operates throughout Northeast Ohio. (TR 228-229.) KMU is a signatory to the current CEA Agreement (TR 230), and accordingly enjoys the benefits of the bargain contained therein, including, but not limited to the obtainment of operating engineers via usage of the Union's referral system. KMU has not only utilized operating engineers on skid steers at jobsites throughout Northeast Ohio starting in 2000 for over a decade, (TR 245-246, 264-265), but also signed a letter of assignment with Local 18 in June of 2010, which explicitly acknowledges that operation of forklifts and skid steers specifically fall within the craft jurisdiction of the Union. Under this letter of assignment, KMU accordingly assigned the operation, maintenance, repair, assembly and disassembly of that equipment, as used in its projects on both a full-time and intermittent basis, to Local 18 members. (TR 247; L18 Exh. 2.)

On May 13, 2013, Local 18 documented an instance at the Equity Trust jobsite in Westlake, Ohio wherein KMU elected to assign the operation of a forklift to a non-operating engineer. (TR 472-473.) In accordance with Step 1 of the CEA Agreement's grievance procedure, Local 18 orally brought a grievance to KMU's attention on May 13 and presented a Miranda Card to a KMU supervisor which explicitly disclaimed a request for reassignment and instead requested damages as mandated by the parties' agreement. (TR 472-473; L18 Exh. 8.) In accordance with Step 2 of the grievance procedure, Local 18 then faxed a written grievance alleging a breach of the CEA Agreement's work preservation clause (Jt. Exh. 3A, ¶ 21) to KMU on May 16, 2013. (TR 472-473; L18 Exh. 8.) That is, by electing to assign construction

equipment that is properly within the contractually mandated craft jurisdiction of Local 18's membership to a non-operating engineer, KMU was in breach of the CEA Agreement's work preservation clause and was contractually required to pay damages to the first qualified registered applicant in the amount of all applicable wages and fringe benefits from the first day of the violation. (Id.)

On May 29, 2013, Local 18 documented an another instance at the Equity Trust jobsite wherein KMU elected to assign the operation of a skid steer to a non-operating engineer. (TR 468-471.) In accordance with Step 1 of the grievance procedure contained within the CEA Agreement, Local 18 orally brought a grievance to KMU's attention on May 29 and presented a Miranda Card to a KMU supervisor which explicitly disclaimed a request for reassignment and instead requested damages as mandated by the parties' agreement. (TR 468-471; Exh. 7.) In accordance with Step 2 of the grievance procedure, Local 18 then faxed a written grievance alleging a breach of the CEA Agreement's work preservation clause (Jt. Exh. 3A, ¶ 21) to KMU on June 3, 2013. (TR 468-471; Exh. 7.) That is, by electing to assign construction equipment that is properly within the contractually mandated craft jurisdiction of Local 18's membership to a non-operating engineer, KMU was in breach of the CEA Agreement's work preservation clause and was contractually required to pay damages to the first qualified registered applicant in the amount of all applicable wages and fringe benefits from the first day of the violation. (Id.)

On July 23, 2013, rather than adhere to its contractual mandate to process Local 18's grievance, KMU filed a ULP Charge, alleging that a jurisdictional dispute was taking place by and between LIUNA 310 and Local 18 regarding the operation of forklifts and skid steers. Notably, the Charge did not identify any particular jobsites, but rather "any and all projects," and

contained no allegations against Local 18 claiming that it either engaged in coercive conduct pursuant to Sec. 8(b)(4)(D) or otherwise made any claims to the work at the Equity Trust jobsite.

c. Schirmer's ULP Charge

Schirmer is an industrial and commercial contractor based in North Olmstead, Ohio, and primarily operates throughout Northern Ohio. (TR 129.) Schirmer is a signatory to the current CEA Agreement (TR 130), and accordingly enjoys the benefits of the bargain contained therein, including, but not limited to the obtainment of operating engineers via usage of the Union's referral system. Schirmer has utilized operating engineers on forklifts and skid steers, both full-time and intermittently, at various jobsites throughout Northeast Ohio. (TR 460-461.)

On March 27, 2013, Local 18 documented an instance at the South Pointe Hospital Phase II renovation in Warrensville Heights, Ohio ("South Pointe Jobsite") wherein Schirmer elected to assign the operation of a skid steer to a non-operating engineer. (TR 475-476.) In accordance with Step 1 of the CEA Agreement's grievance procedure, Local 18 orally brought a grievance to Schirmer's attention on March 27 and presented a Miranda Card to a Schirmer supervisor which explicitly disclaimed a request for reassignment and instead requested damages as mandated by the parties' agreement. (TR 475-476; L18 Exh. 9.) In accordance with Step 2 of the grievance procedure, Local 18 then faxed a written grievance alleging a breach of the CEA Agreement's work preservation clause (Jt. Exh. 3A, ¶ 21) to Schirmer on April 1, 2013. (TR 475-476; L18 Exh. 9.) That is, by electing to assign construction equipment that is properly within the contractually mandated craft jurisdiction of Local 18's membership to a non-operating engineer, Schirmer was in breach of the CEA Agreement's work preservation clause and was contractually required to pay damages to the first qualified registered applicant in the amount of all applicable wages and fringe benefits from the first day of the violation. (Id.)

On July 23, 2013, rather than adhere to its contractual mandate to process Local 18's grievance, Schirmer filed a ULP Charge, alleging that a jurisdictional dispute was taking place by and between LIUNA 310 and Local 18 regarding the operation of forklifts and skid steers. Notably, the Charge did not identify any particular jobsites, but rather "any and all projects," and contained no allegations against Local 18 claiming that it either engaged in coercive conduct pursuant to Sec. 8(b)(4)(D) or otherwise made any claims to the work at the South Pointe jobsite.

d. Platform's ULP Charge

Platform is a commercial construction company that sells concrete and performs excavations primarily throughout Northeast Ohio. (TR 186.) Schirmer is a signatory to the current CEA Agreement (TR 208-209), and accordingly enjoys the benefits of the bargain contained therein, including, but not limited to the obtainment of operating engineers via usage of the Union's referral system. Platform has utilized operating engineers on skid steers at a jobsite in Northeast Ohio as recently as 2013. (TR 204-209, 458; L18 Exh. 1.)

On May 29, 2013, Local 18 documented an instance at the Equity Trust jobsite wherein Platform elected to assign the operation of a skid steer to a non-operating engineer. (TR 478-479.) In accordance with Step 1 of the CEA Agreement's grievance procedure, Local 18 orally brought a grievance to Platform's attention on May 29 and presented a Miranda Card to a Platform supervisor which explicitly disclaimed a request for reassignment and instead requested damages as mandated by the parties' agreement. (TR 478-479; L18 Exh. 10.) In accordance with Step 2 of the grievance procedure, Local 18 then faxed a written grievance alleging a breach of the CEA Agreement's work preservation clause (Jt. Exh. 3A, ¶ 21) to Platform on June 3, 2013. (TR 478-479; L18 Exh. 10.) That is, by electing to assign construction equipment that is properly within the contractually mandated craft jurisdiction of Local 18's membership to someone other

than an operating engineer, Platform was in breach of the CEA Agreement's work preservation clause and was contractually required to pay damages to the first qualified registered applicant in the amount of all applicable wages and fringe benefits from the first day of the violation. (Id.)

On July 23, 2013, rather than adhere to its contractual mandate to process Local 18's grievance, Platform filed a ULP Charge, alleging that a jurisdictional dispute was taking place by and between LIUNA 310 and Local 18 regarding the operation of skid steers. Notably, the Charge did not identify any particular jobsites, but rather "any and all projects," and contained no allegations against Local 18 claiming that it either engaged in coercive conduct pursuant to Sec. 8(b)(4)(D) or otherwise made any claims to the work at the Equity Trust jobsite.

e. Independence's ULP Charge

Independence is a commercial construction company that performs site development, demolition, concrete installation, utility installation, and mass grading. (TR 334-335.) Independence is a signatory to the current CEA Agreement (TR 335), and accordingly enjoys the benefits of the bargain contained therein, including, but not limited to the obtainment of operating engineers via usage of the Union's referral system. Independence has utilized operating engineers on skid steers at various jobsites throughout Ohio for over a decade. (TR 336.) Indeed, no less than the President of Independence himself, Victor DiGeronimo, (*Donley's II*, TR 183) offered unrefuted testimony that Local 18 members have operated forklifts and skid steers for Independence during the entirety of his life-long construction career. (*Donley's II*, 190.)

On March 21, 2013, Local 18 documented two instances at the Alcoa plant demolition project in Cleveland, Ohio ("Alcoa jobsite") wherein Independence elected to assign the operation of a forklift and a skid steer to non-operating engineers, respectively. (TR 480-481,

483-486.) In accordance with Step 1 of the CEA Agreement's grievance procedure, Local 18 orally brought a grievance to Independence's attention on March 21 and presented Miranda Cards to a Independence supervisor which explicitly disclaimed a request for reassignment and instead requested damages as mandated by the parties' agreement. (TR 480-481, 483-486; L18 Exhs. 11-12.) In accordance with Step 2 of the grievance procedure, Local 18 then faxed two written grievances alleging breaches of the CEA Agreement's work preservation clause (Jt. Exh. 3A, ¶ 21) to Independence on March 26, 2013. (TR 480-481, 483-486; L18 Exhs. 11-12.) The grievances stated that by electing to assign construction equipment that is properly within the contractually mandated craft jurisdiction of Local 18's membership to someone other than an operating engineer, Independence was in breach of the CEA Agreement's work preservation clause and was contractually required to pay damages to the first qualified registered applicant in the amount of all applicable wages and fringe benefits from the first day of the violation. (Id.)

On July 23, 2013, rather than adhere to its contractual mandate to process Local 18's grievances, Independence filed a ULP Charge, alleging that a jurisdictional dispute was taking by and between LIUNA 310 and Local 18 regarding the operation of forklifts and skid steers. Notably, the Charge did not identify any particular jobsites, but rather "any and all projects," and contained no allegations against Local 18 claiming that it either engaged in coercive conduct pursuant to Sec. 8(b)(4)(D) or otherwise made any claims to the work at the Alcoa jobsite.

f. Donley's ULP Charge

Donley's is a commercial construction company that performs construction management work, general contracting, design-build work, and structural concrete work. (TR 39.) Donley's is a signatory to the current CEA Agreement (TR 40), and accordingly enjoys the benefits of the

bargain contained therein, including, but not limited to the obtainment of operating engineers via usage of the Union's referral system.

On May 8, 2013, Local 18 documented an instance at the Commerce Park Apartments project ("Commerce Park jobsite") in Highland Hills, Ohio wherein Donley's elected to assign the operation of a forklift to a non-operating engineer. (TR 487-489.) In accordance with Step 1 of the CEA Agreement's grievance procedure, Local 18 orally brought a grievance to Donley's attention on May 8 and presented a Miranda Card to a Donley's supervisor which explicitly disclaimed a request for reassignment and instead requested damages as mandated by the parties' agreement. (TR 487-479; L18 Exh. 13.) In accordance with Step 2 of the grievance procedure, Local 18 then faxed a written grievance alleging a breach of the CEA Agreement's work preservation clause (Jt. Exh. 3A, ¶ 21) to Donley's on May 13, 2013. The grievance stated that by electing to assign construction equipment that is properly within the contractually mandated craft jurisdiction of Local 18's membership to non-operating engineers, Donley's was in breach of the CEA Agreement's work preservation clause and was contractually required to pay damages to the first qualified registered applicant in the amount of all applicable wages and fringe benefits from the first day of the violation. (Id.)

On June 13, 2013, Local 18 documented three instances at the University Hospitals Parking Garage jobsite ("UH Parking jobsite") in Cleveland, Ohio wherein Donley's elected to the operation of two forklifts and one skid steer to individuals other than operating engineers. This event occurred at a construction project at. (TR 490-492, 494-497.) In accordance with Step 1 of the CEA Agreement's grievance procedure, Local 18 orally brought three grievances to Donley's attention on June 13 and presented Miranda Cards to a Donley's supervisor which explicitly disclaimed a request for reassignment and instead requested damages as mandated by

the parties' agreement. (TR 490-492; L18 Exhs. 14-16.) In accordance with Step 2 of the grievance procedure, Local 18 then faxed three written grievances alleging a breach of the CEA Agreement's work preservation clause (Jt. Exh. 3A, ¶ 21) to Donley's on June 18, 2013. That is, that by electing to assign construction equipment that is properly within the contractually mandated craft jurisdiction of Local 18's membership to non-operating engineers, Donley's was in breach of the CEA Agreement's work preservation clause and was contractually required to pay damages to the first qualified registered applicant in the amount of all applicable wages and fringe benefits from the first day of the violation. (TR 490-492; L18 Exhs. 14-16.)

On June 24, 2013, Local 18 documented another instance at the Commerce Park jobsite wherein Donley's elected to assign the operation of a forklift to a non-operating engineer. (TR 498-499.) In accordance with Step 1 of the CEA Agreement's grievance procedure, Local 18 orally brought a grievance to Donley's attention on May 8 and presented a Miranda Card to a Donley's supervisor which explicitly disclaimed a request for reassignment and instead requested damages as mandated by the parties' agreement. (TR 498-499; L18 Exh. 17.) In accordance with Step 2 of the grievance procedure, Local 18 then faxed a written grievance alleging a breach of the CEA Agreement's work preservation clause (Jt. Exh. 3A, ¶ 21) to Donley's on June 25, 2013 and requested a meeting with Donley's. (Id.) That is, by electing to assign construction equipment that is properly within the contractually mandated craft jurisdiction of Local 18's membership to someone other than an operating engineer, Donley's was in breach of the CEA Agreement's work preservation clause and was contractually required to pay damages to the first qualified registered applicant in the amount of all applicable wages and fringe benefits from the first day of the violation. (Id.)

In preparation for the Commerce Park project, Local 18 held a pre-job conference with Donley's. (TR 114.) During a pre-job conference, Union and Employer representatives review the project's construction demands, pertinent contractual provisions, and corresponding manpower requirements. (Jt. Exh. 3A, ¶¶ 15-16.) Donley's acknowledged that during this meeting, Local 18 representatives never made any claims for work, but merely inquired as to who would operate the forklifts and skid steers for Commerce Park jobsite. (TR 114, 122-123.) Indeed, such an inquiry was never a demand for work, but rather was a routine portion of the conference with the employer (TR 501-502). Notably, the Charging Parties in *Donley's II* also recognized such inquiries did not constitute a demand for work in any way, shape or form. (*Donley's II*, TR 315, 488, 542-543.)

In conformity with its predilection for fashioning sham Sec. 10(k) disputes out of legitimate work preservation grievances (see *Donley's I* and *Donley's II*), on October 18, 2013, rather than adhere to its contractual mandate to process Local 18's grievance, Donley's filed a ULP Charge, alleging that jurisdictional disputes were taking place by and between LIUNA 310 and Local 18 regarding the operation of forklifts and skid steers. Notably, the Charge did not identify any particular jobsites, but rather "any and all projects," and contained no allegations against Local 18 claiming that it either engaged in coercive conduct pursuant to Sec. 8(b)(4)(D) or otherwise made any claims to the work at the Alcoa jobsite.

To date, none of the abovementioned grievances have been resolved.

V. Statement of Case

On September 30, 2013, the Regional Director issued an Order Consolidating Cases and Notice of Hearing ("Notice"). In so doing, the Regional Director notified Local 18 that the Board was consolidating the abovementioned ULP Charges, except for Donley's, and was exercising its

authority under Section 10(k) of the Act to conduct a hearing on October 15, 2013 concerning the jurisdictional disputes alleged in such ULP charges. Due to the federal government shutdown, the hearing was postponed indefinitely until further notice. On October 24, 2013, the Board issued an Order rescheduling the hearing to November 18, 2013. On November 12, 2013, the Board issued an Order again rescheduling the hearing to January 13, 2014. On December 13, 2013, the Board issued a Second Order Consolidating Cases and Notice of Hearing, incorporating Donley's ULP Charge into the January 13, 2014 hearing.

The Notice identified the specific work at issue to be: 1) for KMU, "operation of forklifts and skid steers as part of a construction project at Equity Trust, Westlake, Ohio"; 2) for Schirmer, "operation of skid steers as part of a construction project at South Pointe Hospital in Warrensville Heights, Ohio"; 3) for Platform, "operation of skid steers as part of a construction project at Equity Trust in Westlake, Ohio"; 4) for 21st Century, "operation of forklifts as part of a construction project at Southwest General Hospital, Middleburg Hts., Ohio"; 5) for Independence, "operation of forklifts and skid steers as part of a construction project at Alcoa, Cleveland, Ohio"; and 6) for Donley's, "operation of forklifts and skid steers as part of a construction project at University Hospitals Lot 59 Garage in Cleveland, Ohio" and the "operation of forklifts as part of a construction project at Commerce Park in Beachwood, Ohio."

VI. Law & Analysis

a. The Regional Director's November 4 Order Should be Quashed Because No Reasonable Cause Exists to Believe That Sec. 8(b)(4)(D) of the Act Has Been Violated.

Before the Board may proceed with a determination of a dispute pursuant to Sec. 10(k) of the Act, it must first be satisfied that reasonable cause exists to believe that Sec. 8(b)(4)(D) has been violated. *Laborers Dist. Council (Capitol Drilling Supplies, Inc.),* 318 NLRB 809, 810

(1995). This determination requires a finding that there is reasonable cause to believe that: (1) a party has used proscribed means to enforce its claims to the work in dispute; (2) there are competing claims to the disputed work between rival groups of employees; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute. *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001). The factual predicate for asserting a colorable Sec. 10(k) dispute is therefore found when an employer faces a proscribed means of enforcing a claim to disputed work as a result of a jurisdictional dispute that is not of his own making and in which he has no interest. *Internatl. Longshormen's & Warehousemen's Union Local 62-B v. NLRB*, 781 F.2d 919, 924 (D.C.Cir.1986). When examining evidence proffered to satisfy the "reasonable cause" standard, evidence must be "viewed in its entirety" and the Region must do so by looking at the "specific language used and surrounding conduct and events." *Bricklayers Local 20 (Altounian Builders, Inc.)*, 338 NLRB 1100, 1101 (2003). For the following reasons, the ULP Charges filed by KMU, Schirmer, Platform, 21st Century, Independence, and Donley's alleging violations of Sec. 8(b)(4)(D) of the Act by LIUNA 310 are in no way, shape, or form amenable to resolution via a Sec. 10(k) proceeding.

1. *Local 18 Has a Valid and Enforceable Work Preservation Objective that Divests the Board of Jurisdiction.*

Collective bargaining is an effort to erect a system of industrial self-government utilizing agreed-upon rules of law which seeks to avoid leaving "matters subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-581, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). As such, it has long been federal policy to promote industrial stabilization through the voluntary use of CBAs. National labor policy encourages the grievance-arbitration procedure as the preferred method of resolving labor-management disputes arising

under collective bargaining agreements. *Id*. *Accord ILWU Local 7 (Georgia-Pacific Corp.)*, 291 NLRB 89, 93 (1988). Congressional support of this policy is clearly set forth in Section 203(d) of the Act, which states: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

In *AT&T Technologies v. Communications Workers*, the Supreme Court reaffirmed the preferred status of labor arbitration stating that contract provisions that calls for arbitration of disputes "have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes, arising during the term of a collective-bargaining agreement." 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). *See also United Paperworkers Internatl. Union v. Misco, Inc.*, 484 U.S. 29, 36-37, 108 S.Ct. 364, 89 L.Ed.2d 286 (1987). With this policy in mind, the Board has determined that it is oftentimes prudent to refrain from exercising its authority to adjudicate alleged unfair labor practices in order to facilitate private dispute resolution under the grievance-arbitration process. *E.g., United Technologies Corp.*, 268 NLRB 557 (1984); *Collyer Insulated Wire*, 192 NLRB 837 (1971); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Moreover, the Board's policy for promoting valid work preservation clauses because they are key components to maintaining "industrial peace," *Machinists District 190 (SSA Terminal LLC)*, 344 NLRB 1018, 1020 (2005), *enfd.* 253 Fed. Appx. 625 (9th Cir.2007), dovetails with the Congressional policy that favors arbitration rather than Board resolution of labor disputes in cases that technically appear to be Section 10(k) disputes, but are in fact work preservation disputes at heart. *See, e.g., USCP-WESCO, Inc. v. NLRB*, 827 F.2d 581, 586 (9th Cir.1987).

The Board has adopted the Supreme Court's premise in *Carey v. Westinghouse Corp.*, 375 U.S. 261, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964), that the grievance and arbitration process has a major role to play in settling jurisdictional disputes. Specifically, the Board stated that:

> "The [Supreme] Court held in *Carey* that prior to a Board 10(k) award, a union involved in a jurisdictional dispute may file a contractual grievance, pursue it to arbitration, and seek to enforce an arbitration award under Section 301. The Court stated that the 'underlying objective of the national labor laws is to promote collective bargaining agreements and to help give substance to such agreements through the arbitration process'; that '[g]rievance arbitration is [a common] method of settling disputes over work assignments'; and that '[s]ince § 10(k) not only tolerates but actively encourages voluntary settlements of work assignment controversies between unions, we conclude that grievance procedures pursued to arbitration further the policies of the Act.'"

ILWU Local 7 (Georgia-Pacific Corp.), 291 NLRB 89, 93 (1988), quoting *Carey*, 375 U.S. at 265-266. This position is not only in accordance with federal policy embracing the role that arbitration plays in resolving disputes arising under CBAs, but is also consonant with the legislative history of Sec. 10(k) itself. In discussing the merits and liabilities of the then-proposed LMRA Bill S.1126, Senator Thomas stated that "[w]e are confident that the mere threat of governmental action [via Board action under Section 10(k)] will have a beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such [jurisdictional] controversies within their own ranks, where they should properly be settled." S. Min. Rep. No. 105., 80th Cong., 1st Sess., I Leg. Hist. 480-481 (LMRA 1947). Similarly, Senator Taft, co-sponsor of the LMRA, stated that the "desired objectives" of enacting, *inter alia*, Sec. 10(k) of the LMRA were "prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining." S. Rep. No. 245, 80th Cong., 1st Sess., I Legislative History of the Labor Management Relations Act ("Leg. Hist.") 414 (LMRA 1947).

The ultimate touchstone for determining the validity of a work preservation clause is finding that, under a totality of circumstances, the clause demonstrates that the union's objective is to preserve the work of its unit members, such that "the agreement or its maintenance is addressed to the labor relations of the . . . employer *vis-à-vis* his own employees." *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 645, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967). *See also Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818 (1986), *enfd.* 827 F.2d 581 (9th Cir.1987) (Where a CBA prohibits the assignment of jurisdictionally covered work to individuals who are not union members, such an agreement includes a legitimate work preservation clause). A lawful work preservation agreement will "have as its objective the preservation of work traditionally performed by employees represented by the union" and the "employer must have the power to give the employees the work in question . . ." *NLRB v. Internatl. Longshoremen's Assn.*, 447 U.S. 490, 504, 100 S.Ct. 2305, 65 L.Ed.2d 289 (1980). *See also Becker Elec. Co. v. Internatl. Bhd. of Elec. Workers, Local Union 212*, 927 F.2d 895, 897 (6th Cir.1991).

While this "right-to-control test is primarily 'an exercise in factfinding . . .'" *Ohio Valley Coal Co. v. Pleasant Ridge Synfuels*, 54 Fed.Appx. 610, 616 (6th Cir.2002), quoting *United Paperworkers Internatl. Union.*, 484 U.S. at 44, the "traditional work test" may be satisfied when the union asserting its work preservation clause successfully demonstrates that the work is "fairly claimable" by the union members "because it requires skills and abilities similar to those of the traditional work performed." *Ohio Valley Coal Co.*, 54 Fed.Appx. at 617. *Accord Newspaper Deliverers (Hudson Cty. News)*, 298 NLRB 564, 566 (1990). In fact, work can be fairly claimable even if the union members have performed such work at other sites for other employers. *Ohio Valley Coal Co.*, 54 Fed.App. at 617. It is "unrealistic to define the area" of a union's "legitimate job protection efforts" too narrowly, for the work preservation objective is

valid if it is aimed at the "type" of jobs that a union's members historically perform and for which they have "the skills and experience." *Canada Dry Corp. v. NLRB*, 421 F.2d 907, 909 (6th Cir.1970).

Where the language of the work preservation clause indicates that it seeks the preservation of work traditionally performed by the union's members pursuant to the terms of the CBA in order to enforce the employer's collective bargaining obligations and the "legitimate expectation[s]" of its employees who would "otherwise be deprived of contractual benefits," even if there is not an "actual threat" of work loss, the work preservation clause is justified. *See Painters Dist. Council 51 (Manganaro Corp.),* 321 NLRB 158, 165-166 (1996). *Accord Mine Workers (UMW) (Dixie Mining Co.),* 188 NLRB 753, 754 (1971) (Board has found a valid work preservation clause where the union attempts to protect and preserve unit jobs by imposing a financial penalty on the employer, thus removing economic incentive to divert work to a cheaper workforce). Moreover, "the term 'traditional work' includes work which unit employees have performed and are still performing at the time they negotiated a work-preservation clause." *Am. Boiler Mfrs. Assn. v. NLRB*, 404 F.2d 547, 552, 554 (8th Cir.1968). That is, a "collective bargaining agreement" may seek to "reacquire" work performed at the time a valid work preservation clause is negotiated. *Id.* at 554. In relying on the Eighth Circuit's decision, the Board has found that "exclusivity of performance" is not a prerequisite to a claim of work preservation or that work cannot be properly reacquired. *Longshoremen (ILA) (Consolidated Express, Inc.),* 221 NLRB 956, 978 (1978), *enfd.* 537 F.2d 706 (2nd Cir.1976).

Additionally, where a union subject to a Sec. 10(k) jurisdictional dispute has already pursued its contractual claims regarding the work at issue via a grievance, as a "noncoercive avenue[] of redress," and the union is "not attempting to expand its work jurisdiction . . . ", the

Board has suggested it would defer Sec. 10(k) proceedings to the application of contractual work preservation agreements between the employer and union. *See Teamsters Local 107 (Reber-Friel Co.)*, 336 NLRB 518, 520-521 (2001). Generally, any purported attempt by a union to preserve the work of its members is legitimate so long as the union's goal is not to have its members replace those already working for the employer and represented by another union. *Longshoremen & Warehousemen (Waterway Terminals Co.)*, 185 NLRB 186, 188 (1970). More specifically, when a work preservation clause defines work to be performed by the unit employees, does not impose legally cognizable obligations on third parties, does not regulate the labor policies of third parties or non-unit employees, and is only used in the context of disputes between the contracting employer and union, the "clause represents a genuine effort to preserve the work of employees in the contract unit" represented by the union. *Plumbers & Pipefitters Union (American Boiler Mfrs. Assn.)*, 154 NLRB 285, 295 (1965) (Member Brown, dissenting).

In maintaining its work preservation grievances under the current CEA Agreement, Local 18's conduct adheres to that required by the Board to establish a valid work preservation objective that would supersede any attempts to subordinate such an objective to Sec. 10(k) proceedings. Specifically, Local 18 has pursued its contractual claims regarding the Southwest General, Equity Trust, South Pointe, Alcoa, Commerce Park, and UH Parking jobsites via grievances and has not made any attempts to expand its work jurisdiction. (L18 Exhs. 5, 7-17) Notably, both Local 18 and the Charging Parties agree that under the current CEA Agreement, forklifts and skid steers are equipment that have been specifically agreed upon by the parties as being within Local 18's contractual craft jurisdiction. (TR 84, 143, 217, 254, 362-363; Jt. Exh. 3A.) Both Local 18 and the Charging Parties also agree that Local 18 never demanded the work while processing these grievances nor at any other time during the performance of the work at

the relevant jobsites. (TR 125-126, 137, 500-501.) *See Teamsters Local 107 (Reber-Friel Co.)*, 336 NLRB at 520-521. Further, as utilized by Local 18 and expressly recognized by the Charging Parties, Miranda Cards furnished to employers in the context of processing Local 18's work preservation grievances merely reflect and reinforces the Union's work preservation objective of the current CEA Agreement when the Charging Parties violate the terms of the CBA. (TR 213-214, 463; E.g., L18 Exh 7.) Local 18's work preservation clause in the current CEA Agreement defines the work to be performed and does not impose obligations or interfere with third parties, such as LIUNA 310. *See Plumbers & Pipefitters Union (American Boiler Mfrs. Assn.)*, 154 NLRB at 295 (Member Brown, dissenting).

Under the current CEA Agreement, the Charging Parties are free to assign work as they please. Moreover, in the future, the Charging Parties are free to decline becoming signatories to the CEA Agreement upon the expiration of the current Agreement, and thereby not be bound to its provisions. However, at all times relevant to the present matter, it is undisputed that 21st Century, KMU, Schirmer, Platform, Independence, and Donley's were bound to the current CEA Agreement during the times in which Local 18 asserted its work preservation objective in its grievances against them. (TR 84, 143, 217, 254, 362-363; Jt. Exh. 3.) Accordingly, they must abide by the terms of the CEA Agreement, including, but not limited to, its work preservation and grievance/arbitration clauses.

Critically, it is beyond dispute that Local 18 has established that operation of forklifts and skid steers has traditionally belonged to the operating engineers for decades (TR 530-531; *Donley's II*, TR 190) via the Union's referral system for a voluminous number of contractors in Northeast Ohio, including, but not limited to the Charging Parties. *See Am. Boiler Mfrs. Assn.*, 404 F.2d at 552, 554. Northeast Ohio contractors also signatories to the CEA Agreements have

historically assigned forklift and skid steer work to operating engineers: B&B Wrecking and Excavating, Inc. (*Donley's II*, TR 787-799); Cleveland Cement Contractors, Inc. (*Donley's II*, TR 813); and Precision Environmental Co. (*Donley's II*, TR 720, 814-823.) Pursuant to the referral system alone, over 2,000 work orders issued for Local 18 members to operate forklifts and skid steers by these employers in the last four years demonstrate that Local has traditionally operated such equipment. (*Donley's II*, TR 648-652.) Further, Local 18 has also received over 260 letters of assignment from the same employers for both full-time and intermittent operation of fork lifts and skid steers. (Jt. Exhs. 6-7.)

Platform has utilized operating engineers on skid steers at a jobsite in Northeast Ohio as recently as 2013. (TR 204-209, 458; L18 Exh. 1.) KMU has utilized operating engineers on skid steers at jobsites throughout Northeast Ohio starting in 2000 for over a decade. (TR 245-246, 264-265.) 21st Century has utilized operating engineers on skid steers at a jobsite in Southwest Ohio as recently as 2012 (TR 291.) Independence has utilized operating engineers on skid steers at various jobsites throughout Ohio for over a decade. (TR 336; *Donley's II*, TR 190.) Schirmer has utilized operating engineers on forklifts and skid steers, both full-time and intermittently, at various jobsites throughout Northeast Ohio. (TR 460-461.) Moreover, in June of 2010 and January of 2013, KMU and 21st Century explicitly acknowledged, respectively, that operation of forklifts and skid steers specifically falls within the craft jurisdiction of the Union and accordingly assigned the operation, maintenance, repair, assembly and disassembly of that equipment, as used in its projects on both a full-time and intermittent basis to Local 18 members. (TR 247, 303-304; L18 Exhs. 2-3.)

Whether LIUNA 310 ever claimed its members were eligible to operate such equipment is irrelevant for the purpose of establishing a valid work preservation defense, as "exclusivity of

performance" is not a prerequisite to a claim of work preservation. *Longshoremen (ILA) (Consolidated Express, Inc.),* 221 NLRB 956, 978 (1978), *enfd.* 537 F.2d 706 (2nd Cir.1976). Because Local 18 members have traditionally operated skid steers and mini excavators, pursuant to the CEA Agreement for over three decades (TR 458, 530-531; Jt. Exhs. 6-7), forklift and skid steer work are the "type" of jobs that Local 18's members historically perform and for which they have "the skills and experience." *Canada Dry Corp.*, 421 F.2d at 909.

Ultimately, the operation of forklift and skid steers is fairly claimable by Local 18, as it requires skills and abilities similar to that which has historically been performed by Local 18 members. *Ohio Valley Coal Co.*, 54 Fed.Appx. at 617; *Newspaper Deliverers (Hudson Cty. News),* 298 NLRB at 566. In order to be fairly claimable, Local 18 need not demonstrate that it was the exclusive union that operated the type of skid steers and forklifts at issue in the instant matter, as "the legitimacy of a work-preservation objective would be virtually precluded in any situation where it could be established that other employees at other sites were doing or had done the work for which protection was being sought." *Longshoremen (ILA) (Consolidated Express, Inc.),* 221 NLRB at 978.

Without doubt, the Charging Parties and LIUNA 310 will assert that the Board has previously held that when a union makes a work preservation claim or files a so-called pay-in-lieu grievance it is in effect asserting a claim for work in dispute and thus triggers a jurisdictional dispute cognizable under Sec. 10(k). *See, e.g., Laborers Local 113 (Super Excavators Inc.),* 327 NLRB 113, 114 (1998). These cases, however, are distinguishable from the facts and circumstances in the present matter insomuch as none of the prior cases that addressed so-called pay-in-lieu grievances involved a valid and legitimate work preservation clause, as is present in the CEA Agreement that Local 18 has with the Charging Parties. Paragraph 21 of the CEA

Agreement provides a proper basis for Local 18's grievances against the Charging Parties that supersedes any Sec. 10(k) jurisdictional dispute mechanisms. (Jt. Exh. 3A.) This section specifically mandates that the sole remedy for when a contractor signatory to the CEA Agreement assigns work otherwise within Local 18's craft jurisdiction to a non-operating engineer is economic sanctions imposed on the signatory contractor. (Id.) As such, Local 18's grievances do not seek to have the disputed work awarded to its members nor do they constitute an unlawful threat if the work is assigned to another bargaining unit. Rather, Local 18's grievances simply seek the actual benefit it bargained for under its agreement with the Charging Parties when Local 18 agreed to forgo any rights it may have to pursue reassignment of disputed work and limit its relief to contractually specified damages.

Considering these facts, especially given that Local 18 has historically performed the work – skid steer and forklift operation – at issue, a finding that Local 18's grievances constitute a means of enforcing a claim to disputed work would be outside the purview of a Sec. 10(k) hearing, as well as contrary to the basic principles and purpose of the Act which protect the rights of parties to collectively bargain and promote the use of arbitration proceedings to resolve disputes between contracting parties. Overall, "preservation of unit work is a legitimate union goal . . . and its attainment through financial penalties when the agreement [regarding work preservation] is violated is equally valid . . ." *Borden, Inc.,* 196 NLRB 1170, 1173 (1972). The Board policy behind "respect[ing]" and "protect[ing]" genuine work preservation clauses is that they "'help maintain industrial peace, and the Board should not assert its jurisdiction in a manner which ensures that legitimate work preservation provisions would become unenforceable.'" *Machinists District 190 (SSA Terminal LLC),* 344 NLRB at 1020.,, quoting *Teamsters Local 578,* 280 NLRB at 821.

Presently, KMU, Schirmer, Platform, 21st Century, Independence, and Donley's have elected to assign equipment that is within the contractually mandated craft jurisdiction of Local 18 to someone other than an operating engineer. While the Employers have the contractual right to elect this course of action, Local 18 has the concurrent right to file a grievance in order to collect monetary damages pursuant to its legitimate work preservation clause and objective. In this manner, the Charging Parties are not in the traditional position of innocent employers caught between two competing demands yet unable to fulfill both simultaneously. Rather, they may satisfy the demands of LIUNA 310 by assigning the work to their members and satisfy Local 18's grievances by paying the contractually bargained-for penalty.

2. The Charging Parties Are Not Innocent Employers Caught Between Two Competing Union Work Demands, but Rather Have Engaged in Collusion with LIUNA 310 to Fashion a Sham Jurisdictional Dispute.

The evidence in the present matter overwhelmingly demonstrates the blatant collusion by the Charging Parties and LIUNA 310 to fashion a sham jurisdictional dispute. Where the employer is responsible for inducing the alleged jurisdictional dispute between the unions, the employer "by its own actions . . . has created a work preservation dispute." *Machinists District 190 (SSA Terminal LLC)*, 344 NLRB at 1020. *Accord Internatl. Longshoremen's & Warehousemen's Union, Local 62-B*, 781 F.2d at 925.

The Board's decisions regarding jurisdictional disputes have repeatedly admonished its readers that Sec. 8(b)(4)(D) does not stand alone, but is rather read together with Sec. 10(k) . *E.g., Teamsters Union (Safeway Stores, Inc.)*, 134 NLRB 1320, 1322 (1961). That is, a true jurisdictional dispute occurs only when there are "competing claims between rival groups of employees . . ." *Id.* Local 18's preservation position must prevail when the Charging Parties "by . . . [their] unilateral action *created* the dispute, by transferring work away" from Local 18. *Id.* at

1323. *Accord Maritime Union (Puerto Rico Marine Mgmt.)*, 227 NLRB 1081, 1083 (1977) (where Board is concerned with union's loss of membership due to employer's unilateral conduct in Sec. 10(k) proceedings, union has legitimate work preservation objective that renders the dispute non-jurisdictional).

In order to establish that a jurisdictional dispute is a sham, affirmative evidence of collusion must be demonstrated. *Laborers Local 317 (Grazzini Bros. & Co.)*, 307 NLRB 1290, 1291 (1992), fn. 5. The record – both in the instant matter, and that from *Donley's I* and *II* – is replete with evidence of the Charging Parties' active participation in a jurisdictional dispute that is of their own making. *Machinists District 190 (SSA Terminal LLC)*, 344 NLRB at 1020. *Accord Internatl. Longshoremen's & Warehousemen's Union, Local 62-B*, 781 F.2d at 925.

Uncontradicted and unchallenged testimony demonstrates that the CEA and Donley's acted as ringmasters in a campaign to systematically undermine Local 18's ability to represent the interest of its members through enforcement of its work preservation clause in the CEA Agreement. In an attempt to jumpstart jurisdictional disputes of their own making, as early as April of 2012, the CEA's Executive Vice-President, Mr. Linville, testified in *Donley's I* that the CEA agreed to include the work preservation clause in the current CEA Agreement with Local 18 because he believed the Union would have "a hard time enforcing" it and the signatory or CEA would attempt to couch proper work preservation grievances instituted by Local 18 in terms of a jurisdictional dispute in order to have it resolved before the Board pursuant to Sec. 10(k) . (*Donley's I*, TR. 306.) And in October of 2012, before Local 18 had filed any of its grievances in *Donley's II*, the CEA preemptively warned LIUNA 310 of an "area-wide campaign" as an assault by Local 18 to claim forklift and skid steer work from LIUNA 310 and other unions. (*Donley's II*, Jt. Exh. 4.)

Leading up to the present matter, the Charging Parties have attempted to manipulate the facts surrounding Local 18's grievances in order to frame a jurisdictional dispute between Local 18 and LIUNA 310 and thus evade their obligation to pay damages pursuant to their CBA with Local 18. Charging Parties could not proffer any reasonable explanation as to why they sent letters to LIUNA 310 claiming that they would "reassign" the work at issue to operating engineers if Local 18 was able to resolve its grievances at the Southwest General, Equity Trust, South Pointe, Alcoa, Commerce Park, and UH Parking jobsites. (TR 118, 307.) They simply issued such letters at the mere urging of the CEA. (Id.) Moreover, all of these so-called reassignment letters erroneously stated that a resolution of the grievances favorable to Local 18 would contractually require the Charging Parties to reassign the work to operating engineers. (Emp. Exhs. 5, 8, 12, 16, 17.) Yet, all of Local 18's grievances in this matter simply sought monetary damages pursuant to its work preservation grievances; the Charging Parties were not "contractually obligated" (Emp. Exh. 19) to assign any work to Local 18. Rendering its threat to strike responses to these letters meaningless, LIUNA 310 acknowledged that it had a no-strike clause contained within its CBA with the CEA and had never struck against these employers previously regarding purported jurisdictional conflicts. (TR 420-422.) Unsurprisingly, the same evidence was elicited in *Donley's II*, wherein LIUNA 310's Business Manager, Terry Joyce, could not recall any other jurisdictional strikes or concerted slowdowns by LIUNA 310 during his tenure as Business Manager or prior as a rank-and-file member of LIUNA 310. (*Donley's II,* TR 588-589.)

A Sec. 10(k) procedure is not "an absolution for employers that find themselves stuck between conflicting contractual obligations they created" nor is designed to "exonerate employees with unclean hands" but rather resolves legitimate "jurisdictional disputes that arise

between unions without costly work stoppages . . .” *Moore-Duncan v. Sheet Metal Workers Intl. Assn. Local 27*, 624 F.Supp.2d 367, 377 (D.N.J. 2008). As such, when the alleged jurisdictional dispute is of the employer’s own making, the employer is not neutral in the dispute as required under Sec. 10(k). Rather, the employer has an interest in one group over another to perform the work at issue. In those instances where the employer has “unclean hands,” the fact that a union demanded the work is insufficient to establish a jurisdictional dispute. *Intl. Longshoremen’s & Warehousemen’s Union Local 62-B*, 781 F.2d at 925.

By filing shoddily constructed ULP charges, yet otherwise actively participating in the contractually mandated grievance procedures leading up to the purported jurisdictional disputes as a front to pervert the Sec. 10(k) process (L18 Exhs. 5, 7-17), the Charging Parties have shed their façade of impartial employers caught between the demands of two competing unions. Instead, they stand as active participants in a jurisdictional dispute they created in an attempt to avoid their contractual obligations to render monetary damages to Local 18 pursuant to its valid work preservation clause. As such, KMU, Schirmer, Platform, 21st Century, Independence, and Donley’s are not innocent employers to whom Sec. 10(k) is available. Ultimately, the evidence taken as a whole affirmatively establishes, as required by the Board, that LIUNA 310’s threats to strike were a sham. *See, e.g., Stage Employees Local 6 (Savvis Center)*, 334 NLRB 214, 215 (2001).

3. Unrelated Federal Lawsuits Concerning the Ohio Operating Engineers Fringe Benefits Fund Do Not Constitute a Claim for Work by Local 18.

The Charging Parties and LIUNA 310 proffered that unrelated federal lawsuits filed by the Ohio Operating Engineers Fringe Benefits Fund (“Fringe Fund”) constituted a claim for the work at issue by Local 18, despite the Fringe Fund being a non-party to the instant matter nor any testimony being adduced concerning the nature of these lawsuits or their foundation. (TR

180-181.) Indeed, the proffers resulted from the Hearing Officer's refusal to entertain testimony concerning these wholly unrelated matters. (TR 178-179.)

However, to the extent that the Board entertains these irrelevant straw man arguments, federal law clearly establishes that the Fringe Fund lawsuits cannot be considered claims for work by Local 18. The Fringe Fund itself is a non-party that is a completely separate entity from any labor union, including Local 18. *See* 29 U.S.C. 186(c)(5)-(6) (Under the Taft-Hartley Act, the multiemployer plans are separate entities from the union with their own boards of trustees, split evenly between employer representatives and union representatives). And from a jurisdictional standpoint, any adjudication of the legality of a Benefits Fund's conduct is *exclusively* within the purview of the federal courts. *E.g., Stuhlreyer v. Armco, Inc.*, 849 F. Supp. 583, 587-88 (S.D. Ohio 1992), *aff'd*, 12 F.3d 75 (6th Cir. 1993) (holding that federal courts have exclusive jurisdiction over ERISA claims pursuant to 29 U.S.C. 1132(e)(1)). Indeed, "a jurisdictional dispute between two unions over the assignment of work . . . does not necessarily impact the Plaintiff funds' ability to recover contributions that are properly due under the Agreement." *Plasterers Local 67 Pension Trust Fund v. Niles Group, LTD*, No. 06-12216, 2007 U.S. Dist. LEXIS 18001, *7 (E.D. Mich. Feb. 23, 2007) (rejecting defendant's argument that the "case really involves a jurisdictional dispute between two unions" regarding work assignments, and granting plaintiff-funds' motion for summary judgment, which required defendant to "double pay" contributions). It is an established point of law that as Congress has given federal courts exclusive authority to decide ERISA matters, the Board lacks jurisdiction over ERISA matters, including payment of contributions pursuant to applicable agreements, such as current CEA Agreement. *See, e.g., Old Dutch Foods*, 968 F. Supp.1292, 1297 (N.D. Ill. 1997) (defendant's

argument that issue was jurisdictional one and thus "reserved under the NLRA for the NLRB" was "misplaced" in "the ERISA context).

b. Even Assuming Arguendo That the Board Has Reasonable Cause to Believe that Sec. 8(b)(4)(D) of the Act Has Been Violated and Determines the Instant Matter on its Merits Pursuant to Sec. 10(k) of the Act, it Should Award the Disputed Work to Local 18.

Pursuant to Sec. 10(k) of the Act, the Board is required to resolve jurisdictional disputes by making an affirmative award of disputed work on the merits of the conflict. *NLRB v. Radio & Television Broadcast Engineers Union*, 364 U.S. 573, 579 (1961). In so doing, the Board will not formulate general rules for making jurisdictional awards, but must decide every case on its own facts. *Machinists Lodge 1743 (J.A. Jones Constr. Co.)*, 135 NLRB 1402, 1410 (1961). A representative list of relevant factors includes the presence of CBAs between the parties, employer preference, employer practice (both present and past), area and industry practice, relative skills and training, economy and efficiency of operations, and any interunion agreements. *Id. Accord Iron Workers Local 1 (Goebel Forming Inc.)*, 340 NLRB 1158, 1161-1162 (2003). No one factor is dispositive, as the Board makes a jurisdictional determination upon consideration of all pertinent factors. *See Printing Pressmen Local 269 (Thompson Brush-Moore Newspapers, Inc.)*, 216 NLRB 154, 157 (1975). The union awarded the disputed work may prevail by not necessarily demonstrating that *all* of the relevant factors weigh in its favor, but rather that the majority of them are favorable. *See Plumbers Local 447 (Rudolph & Sletten Inc.)*, 350 NLRB 276, 282 (2007). *See also IBEW Local 363 (U.S. Information Systems)*, 326 NLRB 1382, 1383-1384 (1998). Under this calculus, if the Board deigns to construe the instant matter as a jurisdictional dispute under Sec. 10(k) of the Act, it should award the disputed work to Local 18 because it clearly prevails on the factors of collective bargaining agreements, area and

industry practice, economy and efficiency of operations, employer preference, and relative skills and training.

1. Collective Bargaining Agreements

Where the unions in a Sec. 10(k) dispute do not have equivalent collective bargaining agreements with the employer, this factor will weigh in favor of the union with the effective CBA that covers the work in dispute. *Laborers Internatl. Union of North America (Eshbach Bros. LP)*, 344 NLRB 201, 203 (2005). In the instant matter, Local 18 has an effective CBA via the current CEA Agreement covering the work in dispute. (Jt. Exh. 3A.) Likewise, the LIUNA 310 also has an effective CBA with the Charging parties for the work in dispute. (Jt. Exh. 1.) Normally, where the unions in dispute have effective CBAs with the employer covering the same disputed work, this factor will not favor any union. *Laborers Local 113 (Super Excavators)*, 327 at 115. However, there are two important considerations that shift this factor in favor of Local 18.

First, unlike Local 18's agreement with the CEA, the CBA negotiated by LIUNA 310 fails to include any specific provision requiring or imposing any economic sanction in the event work or equipment contractually stipulated as belonging to a LIUNA affiliate is transferred to another non-LIUNA employee. Second, uncontradicted evidence elicited at the hearing established that, until the current CBA (Jt. Exh. 1), prior agreements between LIUNA 310 and the CEA failed to identify skid steers or mini excavators in any way, shape, or form. (TR 372.). Tellingly, both the Charging Parties and LIUNA 310 chose not to provide predecessor agreements to the Hearing Officer. By contrast, skid steers and forklifts were identified as construction equipment that is exclusively within Local 18's craft jurisdiction, both in the current CEA Agreement *and* its predecessors. (TR 84, 143, 217, 254, 362-363; Jt. Exh. 3.)

These circumstances support a finding that this factor weighs in favor of Local 18 because "the Board looks to whether one of [the CBAs] gives a superior claim." *Bridge Workers Local 1 (Goebel Forming Inc.)*, 340 NLRB 1158, 1161 (2003). This more nuanced balancing test utilized by the Board in analyzing the CBA factor has been upheld in other contexts as well. *See Laborers District Council of Ohio Local 265 (AMS Constr.)*, 356 NLRB No. 57, *19-20 (2010) (where Union A's CBA specifically referred to the disputed work, but the Union B's CBA was worded in more general terms, the CBA factor was in favor of Union A). Thus, on balance, the CBA factor should be accorded to Local 18.

2. Area and Industry Practice

Area and industry practice for the assignment of the disputed work clearly favors Local 18. For over a decade, the Charging Parties have recognized that the operation of skid steers and forklifts properly falls within the jurisdiction of Local 18 by utilizing operating engineers to operate them.

Platform has utilized operating engineers on skid steers at a jobsite in Northeast Ohio as recently as 2013. (TR 204-209, 458; L18 Exh. 1.) KMU has utilized operating engineers on skid steers at jobsites throughout Northeast Ohio starting in 2000 for over a decade. (TR 245-246, 264-265.) 21st Century has utilized operating engineers on skid steers at a jobsite in Southwest Ohio as recently as 2012 (TR 291.) Independence has utilized operating engineers on skid steers at various jobsites throughout Ohio for over a decade, adhering to the terms of the CEA Agreement only until it filed its sham allegations of jurisdictional dispute. (TR 336; *Donley's II*, TR 190.) Schirmer has utilized operating engineers on forklifts and skid steers, both full-time and intermittently, at various jobsites throughout Northeast Ohio. (TR 460-461.) Moreover, in June of 2010 and January of 2013, KMU and 21st Century explicitly acknowledged,

respectively, that operation of forklifts and skid steers specifically falls within the craft jurisdiction of the Union and accordingly assigned the operation, maintenance, repair, assembly and disassembly of that equipment, as used in its projects on both a full-time and intermittent basis to Local 18 members. (TR 247, 303-304; L18 Exhs. 2-3.) Additionally, Local 18 offered unchallenged testimony from its own representatives that the Charging Parties in fact do consistently assign forklifts and skid steers to operating engineers throughout Ohio. (TR 458, 530-531.)

Furthermore, as an Ohio-wide labor organization encompassing, *inter alia*, the geographical areas containing the Southwest General, Equity Trust, South Pointe, Alcoa, Commerce Park, and UH Parking jobsites, it is uncontested that Local 18 has received, in the last four years alone, over 2,000 work orders from signatory contractors for the referral of a Local 18 member capable of operating skid steers and forklifts. (*Donley's II*, TR 649-652.) Additionally, these numbers only reflect Local 18 members individually dispatched through the Union's office; there are additional Local 18 members operating forklifts and skid steers who remain employed with the same contractors year after year and are not counted among the referral numbers. (*Donley's II*, TR 652.) Furthermore, it is uncontested that Local 18 has received over 200 letters of assignment for skid steer work (Jt. Exh. 6) and over 60 letters of assignment for forklift work (Jt. Exh. 7) (both for full-time and intermittent work) from Ohio contractors within the last eight years. Moreover, half of these letters have been received in the last three years and a third of these letters account for work purely done within the northeastern Ohio region. (Id.) Indeed, other Northeast Ohio contractors also signatories to the CEA Agreements have historically assigned forklift and skid steer work to operating engineers: B&B Wrecking and Excavating, Inc. (*Donley's II*, TR 787-799); Cleveland Cement Contractors, Inc. (*Donley's II*,

TR 813); and Precision Environmental Co. (*Donley's II*, TR 720, 814-823.) This type of work in regards to its location and intermittency is functionally equivalent to the work being performed by the Charging Parties at the jobsites in issue.

By contrast, LIUNA 310 has presented only 94 letters of assignment, all of them, save for 18, directed to multiple Ohio LIUNA Locals which are not parties to the case in dispute. (Jt. Exh. 4; TR 423-424.) Additionally, many of these letters are less than recent and are specifically limited to the purpose of supplying masonry materials to bricklayers. (Id.)

Here, Local 18's superior showing of letters of assignment, work referrals, and area practice, both in quantity and type support a finding in Local 18's favor. *IBEW Local 71 (Capital Electric Line Builders Inc.)*, 355 NLRB 140, 143 (2010). *Accord Operating Engineers Local 825 (Nichols Electric Co.)*, 137 NLRB 1425, 1433 (1962), *enf.* 315 F.2d 695 (3rd Cir.1963). Thus, on balance, the area and industry factor should be accorded to Local 18.

3. Interunion Agreements

An interunion agreement between the International Union of Operating Engineers ("IUOE") and the International Hod Carriers, Building and Common Laborers Union of America (LIUNA's predecessor) existed from 1954 until 2012, when it was repudiated by LIUNA in 2012. (L18 Exh. 4.) This agreement stated that forklifts and other similar type of equipment would be operating by operating engineers. (Id.) The existence of this Agreement for such a long period of time is clearly demonstrative of the fact that Local 18 members have historically been favored and appointed as forklift operators throughout Ohio.

The Board has long acknowledged the existence of this very interunion agreement since 1958, in which it recognized that the IUOE and LIUNA "had made multiple attempts to "carry out" the 1954 Agreement regarding forklifts. *Operating Engineers, Local 12 (W. Coast Masonry*

Contrs., Inc.), 120 NLRB 53, 55 (1958), fn 1. The Board's evaluation of an interunion agreement's weight depends on its applicability to the unions and whether either of the union's subsequent CBAs have expressly listed the equipment at issue as within its craft jurisdiction. *See Operating Engineers, Local 478 (Deluca-Lombardo)*, 314 NLRB 589, 592-593 (1994). In the present matter, the 1954 Agreement clearly binds Local 18 and LIUNA 310 to the terms of the Agreement as third-party beneficiaries. Moreover, until 2012, only the Local 18 CEA Agreements throughout the decades specifically identified forklifts and skid steers as equipment falling within Local 18's exclusive craft jurisdiction. (Jt. Exh. 3.) Thus, under the Board's standard in *Operating Engineers, Local 478 (Deluca-Lombardo)*, the 1954 Agreement is clearly granted substantial weight in the assessment as to whom the work at issue should be awarded. Indeed, the Board has specifically recognized and utilized the 1954 Agreement in prior Sec. 10(k) determinations. *See N. Cal. Dist. Council of Laborers (RMC Lonestar)*, 309 NLRB 412, 413 (1992) (under 1954 Agreement as concerning drilling operations, based on the craft delineation awarding such work to operating engineers where drill and compressor were part of same unit, this factor was in favor of operating engineers where work at issue involved such equipment). Thus, on balance, the interunion factor should be accorded to Local 18.

4. Economy and Efficiency of Operations

While conventional analyses of economy and efficiency of operations involve the Board investigating the nature of the work performed by the competing unions, *e.g., Laborers' Local 860 (Anthony Allega Cement Contractor, Inc.)*, 336 NLRB 358, 363 (2001), the unique facts of the instant dispute beg an inquiry in another direction. Namely, the finding that it would be more economical to award the disputed work to LIUNA 310 would result in an absurd situation in which the Board essentially gives sanction to the Charging Parties' breach of the work

preservation clauses in the CEA Agreement with Local 18. By not awarding Local 18 the disputed work, the Employers would be subject to both the labor costs associated with LIUNA 310 *and* damages costs associated with Local 18 pursuing any and all grievances that allege a breach of the work preservation clause in the current CEA Agreement.

In examining this factor, the Board has previously addressed conflicts between contractual terms and workplace economy by recognizing that where conditions in CBA clauses would result in impractical costs to the employer, it would not award the disputed work to the union that would activate such unnecessary expenditures. *E.g., Teamsters Local 1187 (Anheuser-Busch, Inc.),* 258 NLRB 997, 1001 (1981) (where awarding work to Union A would result in contractually mandated job-bidding restrictions and work guarantees potentially subjecting the employer, *inter alia*, to greater costs, the Board found this factor in favor of Union B). *Accord Glaziers Local 1621 (Hart Glass Co.),* 216 NLRB 641, 643 (1975). Thus, the Charging Parties cannot state that it is more efficient and economical to retain only laborers when it is mandated by the current CEA Agreement to pay damages to operating engineers in the event that they assign forklift and skid steer work to LIUNA 310 members.

Additionally, the unchallenged evidence from the record established that the Charging Parties had full authority to assign the operation of skid steers and forklifts, as well as any attendant duties, to Local 18 members. (TR 74, 77-78, 161, 247-248, 317-318.) In so doing, the Charging Parties agreed that this work performed by operating engineers would be no less efficient than utilizing LIUNA 310 members to perform the same. (TR 260-261.) Moreover, both Local 18's CEA Agreement and LIUNA 310's CBA with the CEA call for equivalent minimum guaranteed payment increments depending on the amount of time worked in a given day. (Jt. Exh. 1, Art. III, Sec. 4-6; Jt. Exh. 3A, ¶ 55; TR 256-257, 520-521.) As such, the Charging Parties

would not be required to pay operating engineers in any larger incremental chunks that laborers for intermittent work. (Id.) Thus, on balance, the economy and efficiency of operations factor should be accorded to Local 18.

5. Employer Preference

The Board will treat employer preference with great skepticism when it appears that the preference is not "representative of a free and unencumbered choice." *ILWU Local 50 (Brady-Hamilton Stevedore Co.),* 223 NLRB 1034, 1037 (1976), *rev'd on other grounds,* 224 NLRB 275 (1979). In the instant matter, the Charging Parties' preference is inextricably linked with their prospect of being subject to damages under the work preservation clause of Local 18's current CEA Agreement. To find that the employer preference factor weighs in favor of LIUNA 310 would essentially mean that the Charging Parties' labor preference is based on an illegitimate desire to avoid their lawfully negotiated collective bargaining terms with Local 18. The Employer's preference is neither "free" nor "unencumbered" but based on a sham. Thus, the factor of efficiency of operations and employer preference should be accorded to Local 18 because to do otherwise would cause the Board to vitiate the duly negotiated CBA between Local 18 and the CEA that was executed pursuant to employee collective bargaining rights under Section 7 of the Act.

6. Relative Skills and Training

In comparing the relative skills and training of the conflicting unions over the disputed work, the Board has held that, all else being equal, formal training is preferable to on-the-job training. *Construction & General Laborers' District Council of Chicago and Vicinity (Henkels & McCoy),* 336 NLRB 1044, 1045 (2001). This results in a finding in favor of the union that demonstrates a greater usage of formal training. *Id*. Although testimony was offered that LIUNA

310 offers training for their members, training occurs at a sole site located in Ohio. (TR 397; *Donley's II*, TR 578.)

On the other hand, Local 18 has developed a state-wide training program, via the Ohio Operating Engineers Apprenticeship and Journeyman Training Program ("Training Program") to establish four comprehensive training sites throughout Ohio (Ritchfield, Logan, Miamisburg, and Cygnet) with both outdoor and indoor all-weather locations and each with specific training for skid steers and mini excavators that faithfully replicate actual working conditions. (Jt. Exh. 10A.) As stated by Donald Black, the Administrator of the Training Program, such training is necessary as operation of skid steers and forklifts is within the exclusive craft jurisdiction of Local 18. (Id.) Along with classes offered throughout the year, Local 18 offers specialized training in forklift and skid steer operation for Local 18 members who operate in the gas and pipeline industry, with over a dozen individual skid steers and excavators each, located throughout the four training sites. (TR 447, 455-457.) Moreover, such training includes required classroom attendance and field work until working proficiency is obtained, as well detailed training manuals, training course materials, test booklets, and student workbooks for skid steer and mini excavators, applicable to all the various attachments that may be added to that equipment in their industrial operation. (Jt. Exhs. 10C to 10I.) The Training Program has also developed an alliance agreement with the Occupational Safety and Health Administration ("OSHA") for the purposes of establishing safety standards for training operating engineers on various pieces of equipment. (Jt. Exh. 10B.) The Training Program has produced over 600 Local 18 members who are formally certified in skid steer operation. (Jt. Exh. 8.)

Notably, the Charging Parties further admitted that any in-house training that they had offered to LIUNA 310 members in the operation of forklifts and skid steers could also be offered

to Local 18 members. (TR 101, 215-216, 254, 361). The Charging Parties acknowledged that there was no compelling reason for why they chose to not do so. (Id.)

The Charging Parties also admitted that they had not actively compared the relative abilities of the operating engineers and the laborers. (TR 62-63.) In speculating that LIUNA 310 members had better relative skills on skid steers and forklifts, the Charging Parties merely relied on the craft jurisdictional lines set forth in the CBA between the CEA and LIUNA 310. (TR 74, 77-78, 376). Indeed, the Charging Parties acknowledged that they had the full authority and discretion to assign the operation of skid steers and forklifts, as well as any attendant duties, to Local 18 members. (TR 74, 77-78, 161, 247-248, 317-318.) By making such an assignment, the Charging Parties agreed that the work performed by operating engineers would be no less efficient than utilizing LIUNA 310 members to perform the same. (TR 260-261.)

In sum, the record clearly establishes that there should not be a "stalemate" due to "equally credible testimony" regarding relative skills and training. *Laborers Internatl. Union of North America (Eshbach Bros. LP)*, 344 NLRB at 204. Rather, because it would be no less efficient to utilized operating engineers on skid steers and forklifts, and as Local 18 has developed a historically more robust training and skills-development program than LIUNA 310, the Union contains members who are better suited to perform the disputed work with the Charging Parties.

c. <u>If, and Only If, The Board Determines That Local 18 Is Not Entitled To The Disputed Work, Charging Parties Are Not Entitled To A Broad Award.</u>

In the event that Local 18 is not awarded the disputed work, a contrary award should be limited to the job sites that were the subject of Local 18's grievances. The Board will only consider increasing the scope of its award if the *disputed work* has been a continuous source of controversy in the relevant geographic area, related disputes are likely to reoccur, and the

charged union has shown a proclivity to use proscribed means in an attempt to secure similar disputed work. *Operating Engineers Local 318 (Foeste Masonry)*, 322 NLRB 709, 714 (1996), citing *Iron Workers Local 1 (Fabcon)*, 311 NLRB 87, 93 (1993). *Accord Bricklayers Local 21 (Sesco Inc.)*, 303 NLRB 401, 403 (1991). All three of these prerequisites must be satisfied and the evidentiary burden in doing so is demanding because "a 10(k) award is ordinarily limited in scope to the particular job-site or jobsites where the proscribed 8(b)(4)(D) conduct has occurred." *IBEW Local 104 (Standard Sign & Signal Co.)*, 248 NLRB 1144, 1148 (1980).

The Charging Parties cannot demonstrate that a broad award is warranted under the exacting evidentiary standard required by the Board to issue an area-wide award. The record is absent of any evidence that would indicate the disputed work has been a continuous source of controversy that would cause similar reoccurrences *and* that Local 18 has demonstrated a habit to use proscribed means to secure similarly disputed work. The existence alone of Local 18's work preservation grievances as against the Charging Parties is *insufficient* to justify a broad award absent evidence of other threatening behavior by the union against whom the award is made. *See IBEW Local 211 (Sammons Communications)*, 287 NLRB 930, 934 (1987) (broad 10(k) award granted in consideration of prior jurisdictional awards *only if* coupled with threat by union against whom award was made to "cause trouble on every other" employer job site). These grievances are merely part and parcel of Local 18's attempt to enforce its above-described legitimate contractual objectives. The record contains no evidence of any purported continuous threatening behavior by Local 18.

The Charging Parties' contention that Local 18's pursuit of the so-called "Goodyear," "PARTA," "800 Superior," and "Med Mart" grievances[2] represent an "ongoing jurisdictional dispute" by Local 18 (TR 170) supporting the finding of an area-wide award is a fallacy. The

[2] These grievances were identified and described in *Donley's I* and *II*.

Board's decision in *Donley's I* merely determined whether there was reasonable cause to believe Sec. 8(b)(4)(D) of the Act was violated, and if so, to which union the disputed work should be awarded. The Board will make the same determination in *Donley's II*. Its decisions *do not* and *cannot* determine whether Local 18 has violated Sec. 8(b)(4)(D). Rather, an adversarial and adjudicatory hearing before an administrative law judge must first issue before the Board can decide whether a Charged Party, such as Local 18, has violated the Act. *Warehouse Union Local 6 (Golden Grain Macaroni Co.)*, 289 NLRB 1, 2 (1988). Additionally, more evidence at an ALJ hearing may be adduced to determine whether, by the preponderance of the evidence, the Charged Party has violated Sec. 8(b)(4)(D). *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116, 122, 92 S.Ct. 360, 30 L.Ed.2d 312 (1971), fn. 10. Even then, it is the Board's responsibility to make the "ultimate determination" of any alleged unfair labor practices. *ITT v. IBEW Local 134*, 419 U.S. 428, 446, 95 S.Ct. 600, 42 L.Ed.2d 558 (1975). And notably, the "PARTA" grievance was resolved by the parties, despite the Charging Parties' attempt to misstate otherwise. (TR 183.) As such, these unrelated grievances have no relevance to determining the scope of the award in the instant matter. Ultimately, if the Board decides to not award the disputed work to Local 18, it should confine the adverse award to the jobsites that were the subject of Local 18's grievances.

Moreover, "[t]he Board customarily declines to grant a broad, area-wide award in cases where the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work." *E.g., Ohio and Vicinity Regional Council of Carpenters (Competitive Interiors)*, 348 NLRB 266, 271 (2006). If the Board deigns to award the work to the Charged Party LIUNA 310 and the Charging Parties continue assigning the work at issue to LIUNA 310, the notion of an area-wide award lacks complete merit in this dispute.

VII. Conclusion

Accordingly, for all the forgoing reasons, Local 18 hereby requests that the December 13 Notice of Hearing be quashed and the hearing in this matter canceled.

Respectfully Submitted,

s/ *Timothy R. Fadel*
TIMOTHY R. FADEL, ESQ. (0077531)
WULIGER, FADEL & BEYER, LLC
1340 Sumner Court
Cleveland, Ohio 44115
(216) 781-7777
tfadel@wfblaw.com
Counsel for the International Union of Operating Engineers, Local 18

CERTIFICATE OF SERVICE

A copy of the foregoing Post-Hearing Brief was electronically filed with National Labor Relations Board and served *via* email to the following on this 18th day of February, 2014:

Frank W. Buck
Littler Mendelson P.C.
1100 Superior Ave. East
20th Floor
Cleveland, Ohio 44114
fbuck@littler.com
F: 216-696-2038

Basil W. Mangano
Mangano Law Offices Co., LPA
2245 Warrensville Center Road
Suite 213
Cleveland, Ohio 44118
bmangano@bmanganolaw.com
F: 216-397-5845

Frederick Calatrello (*via* regular mail, postage pre-paid only)
Regional Director
Region 8
National Labor Relations Board
1240 East 9th Street, Room 1695
F: 216-522-3715

s/ *Timothy R. Fadel*
TIMOTHY R. FADEL, ESQ. (0077531)
WULIGER, FADEL & BEYER, LLC
1340 Sumner Court
Cleveland, Ohio 44115
(216) 781-7777
tfadel@wfblaw.com
Counsel for the International Union of Operating Engineers, Local 18